

MEMORANDUM OF UNDERSTANDING
No.
BETWEEN
THE U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION,
THE STATE OF WASHINGTON DEPARTMENT OF ECOLOGY AND
DEPARTMENT OF FISH AND WILDLIFE
AND
THE KENNEWICK IRRIGATION DISTRICT
FOR
RED MOUNTAIN AVA PUMP PROJECT
(ADDITIONAL POINT OF DIVERSION FOR KENNEWICK IRRIGATION DISTRICT at KIONA to
SERVICE RED MOUNTAIN AREA)

PARTIES

This Memorandum of Understanding (MOU) is entered into between the United States Bureau of Reclamation (Reclamation), the State of Washington (State), by and through the Department of Ecology (Ecology) and the Department of Fish and Wildlife (WDFW), and the Kennewick Irrigation District.

PURPOSE, OBJECTIVE, AND SCOPE

This MOU outlines the mutual understanding between the Parties to effectuate a project proposal to serve new acres within and near to the Red Mountain American Viticultural Area (Red Mountain AVA) using the existing water supplies for KID and making water budget neutral changes to the water rights held by Reclamation on behalf of KID (US/KID water right). The project's major features will include a new point of diversion and pumping plant on the Yakima River, new included irrigated acres offset by the exclusion of currently irrigated acres, and the addition of increased instream flows for certain reaches of the Yakima River.

This MOU outlines the mutual understanding of the Parties and is not a contract. The Parties intend to use their best efforts to work collaboratively and in good faith to facilitate the objectives of this MOU.

BACKGROUND

Over the last decade, KID has undergone significant changes to its customer base as urbanized lands have displaced agricultural irrigation. KID has sought to transfer irrigation water to new agricultural use, most notably the Red Mountain AVA, but has nonetheless been temporarily outpaced by urbanization..

KID proposes to reallocate irrigation to the Red Mountain area, while providing greater system reliability and increasing instream flows in the lower Yakima River.

RECITALS

Whereas, the KID's boundary includes lands in the area of Benton County, State of Washington which are in substantial part within the Red Mountain AVA;

Whereas, Red Mountain area has never been served with surface water by KID due to insufficient water supplies and infrastructure;

Whereas, the US/KID water right was confirmed by a Conditional Final Order ("CFO") entered by the Yakima County Superior Court in the water adjudication captioned *State of Washington Department of Ecology v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5 (CFO), said US/KID CFO being based on a 2001 Settlement Agreement between KID, Reclamation, the Confederated Bands and Tribes of the Yakama Nation (Yakama Nation), and Ecology;

Whereas, the KID has sufficient irrigated acres under the CFO that can be excluded from the 20,201 currently irrigated irrigable acres as provided for in the Settlement Agreement and offset the use on 1,785 new irrigated acres in the Red Mountain area with a water budget neutral result and without injury to any other water rights;

Whereas, the Parties desire to divert water under the CFO at an additional point of diversion near Kiona which will also increase instream river flows from the reach between the Prosser diversion and the Kiona site;

and,

Whereas, the parties have engaged in detailed discussion of this project proposal for a period of years and the parties have determined to enter into this MOU to set forth their intentions to effectuate its terms;

Now, therefore, the Parties acknowledge the following:

1. Definitions

(a) Beneficial Use – As of the date of this Agreement, the parties agree that the US on behalf of KID has made beneficial use of its water right as described and reflected in the 2001 CFO, and that no part of that right has been relinquished.

(b) Consumptive Use –

(1) Consumptive Use is defined, herein, exactly as it is defined on page 9 of the 2001 Settlement Agreement.

(2) In order to comply with the 2001 Settlement Agreement, (page 9), regarding new lands annexed and served by KID, Ecology and KID will complete a consumptive use analysis which will be reviewed and agreed to by the parties to this MOU.

(3) Ecology and KID will estimate district wide consumptive use based on aerial photography, KID water service records, crop type, and State irrigation standards, such as the Washington Irrigation Guide and Ecology's GUID 1210 methodology.

(4) For lands temporarily not served by KID within KID's 20,201 irrigated acres limitation as set in the 2001 Settlement Agreement, (such as impervious surfaces or where land use is transitioning for other uses), Ecology and KID will assign a consumptive use based on average district-wide consumptive use.

(c) "Net Water Savings" shall be defined as in RCW 90.38.010(2): Net water savings "means the amount of water that through hydrological analysis is determined to be conserved and usable for other purposes without impairing existing water rights, reducing the ability to deliver water, or reducing the supply of water that otherwise would have been available to other water users. At the time of this Agreement, net water savings resulting from the new Kiona Diversion is estimated to be 20,403 ac-ft with a schedule of net water savings by reach as shown in Attachment 1.

(d) "Water Budget Neutral" - diversions or withdrawals of waters of the State which are proposed to be exchanged for at least an equivalent amount of water from other water rights, donation of water rights into trust, relinquishment of other water rights, or other mitigation projects that result in no diminishment of the source.

2. Construct a new point of diversion at Kiona. KID will construct a new point of diversion from the Yakima River at Kiona to pump water through a new pump station to serve the Red Mountain area.

3. Compliance with 20,201 Limitation. KID will include additional acres for service within the District boundary contingent on exclusion from service of equivalent acreage currently authorized for service. Reclamation will assist KID on this exclusion/inclusion process. The Parties anticipate that the approximately 1,785 acres to be included and receive irrigation at Red Mountain can be offset by acres to be excluded that are currently served.

4. Change Elements of the US/KID water right. To implement the actions described in Article 2 and 3, above, the US/KID water right must be changed to add the new point of diversion, modify the description of the District's boundary (place of use), and add a purpose of use (instream flow in the intervening reach). Reclamation on behalf of KID will apply to Ecology through an administrative change process to redirect a portion of its May 10, 1905 water right downstream from Prosser to the new point of diversion near Kiona as reflected in Exhibit 1. Reclamation will apply after this MOU is signed by all parties. Reclamation will request priority processing of the application pursuant to WAC 173-152-050(3)(a). WDFW and Ecology will support priority processing of the application. The parties acknowledge that this MOU is guided by the laws governing water rights under federal or Washington State law as they exist on the date of the execution of this MOU and the parties reserve the right to modify positions based on future changes in statute that materially affect this MOU.

5. Amend 2001 Settlement Agreement. Ecology, KID and Reclamation intend, if the Yakama Nation concurs, to amend the 2001 Settlement Agreement for the exclusive purposes described in Article 4, above, only. This amendment will be executed by a written amendment separate from this MOU. Except for the specific changes agreed to in said amendment, the parties to this MOU intend that all terms of the 2001 Settlement Agreement remain binding and in full force and effect until otherwise specifically and expressly amended, modified, or waived by the Settlement parties. The 2001 Settlement Agreement is not amended by this MOU.

6. Trust Water Program. Reclamation, on behalf of KID, will apply to change a portion of the US/KID water right to add an instream purpose of use and place of use and to also apply to have a portion of the US/KID water right assigned to the Trust Water Program (TWP) under RCW 90.38.020 or RCW 90.38 or 90.42. Reclamation, Ecology and KID will negotiate the quantity of water to be assigned to the TWP. Reclamation, Ecology and KID agree that quantity assigned to trust is as shown in Attachment 1. For the quantity to be assigned to the TWP, Ecology shall base this quantity on the amounts shown in Attachment 1, diverted for KID at the Prosser Dam. Reclamation and KID may assign additional water to the TWP to enhance management of the water right for in-stream flows.

Ecology will calculate and record the net water savings from the project in its permitting decision. Ecology will include both the consumptive and non-consumptive quantities of net water savings that have been delivered into the KID Main Canal headworks and that will be delivered to new downstream withdrawals. KID and Ecology will estimate the non-consumptive quantities, derived from the reduction of flows to the hydraulic pumps at Chandler and in-district conveyance water, and document these quantities in Ecology's decision on the application.

Reclamation and KID intend to include conditions and provisions when assigning the portion of the water right to the TWP that will reserve, protect, and allow KID to serve the district water users in light of changing demographics and cropping patterns and practices. That is, the approved change will allow the amount of water that is used instream and for instream purposes and assigned to the TWP to fluctuate, (up to the maximum quantity to be stated in the

application), so that Reclamation and KID may provide for fluctuating water demands without further change proceedings, provided that there is no change in consumptive use or acres currently authorized for service. Notwithstanding the conditions of assignment, as discussed above, the term of the assignment into the TWP will be for a period of ten (10) years, with automatic renewals.

Due to the temporary term of the TWP assignment, a Petition to the Acquavella Court is necessary to change the attributes of the US/KID water right before applying to Ecology for a TWP assignment. However, Reclamation makes no commitment to defend any appeal of Ecology's or the Court's Decision regarding the subject Petition, application and TWP assignment.

7. SEPA and NEPA. KID will be the lead agency for SEPA for the project and Reclamation will be the lead agency for NEPA for the project. KID and Reclamation will circulate its environmental review documents to the Parties, hereto, prior to making threshold determinations. The "Pumping Point of Diversion Alternative Study" funded by Ecology will form the basis for alignment alternatives in the environmental review.

8. Wildlife. The "KID Red Mountain LID" will mitigate for impacts to wildlife from converting native shrub steppe to additional irrigated acres in the Red Mountain area. It is anticipated that the mitigation will consist of a payment of \$1 million dollars from KID and Ecology to WDFW. KID, WDFW and Ecology will manifest this mitigation commitment in a separate agreement.

9. Funding. The total estimated construction cost for the project is \$12.5 million and mitigation is estimated at \$1 million. Ecology commits \$10 million dollars from the Columbia River Account for construction of the Kiona pump station infrastructure and an additional \$500,000 in shrub steppe mitigation funding. KID is responsible for the remaining funds. Ecology and KID will enter into a funding agreement for the \$10.5 million dollar grant that will include terms for recovery of a portion of the grant to Ecology and/or use of recovered funds for development of a separate future project. Ecology and WDFW will enter into a funding agreement that implements shrub steppe mitigation. The United States commits no funds under this MOU and is not a party to any other funding agreement regarding the project addressed in this MOU.

10. Other KID matters before Ecology unaffected by this MOU. The parties agree that the KID's pending 82 cfs application is in no way affected by this MOU.

11. The Yakama Nation is not a party to this MOU. The Confederated tribes and Bands of the Yakama Nation is not a party to this MOU and is not bound hereto. No party herein represents, nor claims to represent, the Yakama Nation.

12. Nonwaiver; Reservation; Not Evidence. This MOU shall not be construed as a waiver of any right or argument by any party regarding relinquishment or abandonment of water rights, and all parties reserve all rights and arguments related to relinquishment or abandonment. Neither shall any statement or supposition of law or fact herein be deemed evidence admissible against the interest of any party.

GENERAL PROVISIONS

1. Nothing in this agreement expands, alters or limits the property or other rights, authority, responsibilities, sovereignty, or jurisdiction of any party. Nothing herein shall act to waive, abrogate, define or diminish the Treaty rights of the Yakama Nation nor the sovereign rights of the State of Washington, the Yakama Nation or the United States.

2. Notwithstanding any other provision of this MOU, the parties acknowledge that Reclamation's actions are subject to federal Reclamation law, as amended and supplemented, and the policies, rules and regulations promulgated by the Secretary of the Interior under federal Reclamation law;

and applicable federal law, including but not limited to, the National Environmental Policy Act (NEPA), Clean Water Act (CWA), and the Endangered Species Act (ESA).

3. Notwithstanding any other provision of this MOU, the parties acknowledge that any contract or agreement executed under this MOU where Project benefits are afforded shall be subject to federal Reclamation law, policies, and rules and regulations governing recovery of Project costs. Any agreement executed under this MOU that implements a joint federal and state program, as authorized and directed by federal law and funded through federal appropriations, shall be subject to federal cost sharing laws, policies and practices.

4. Nothing in this MOU is intended to create any right in any entity not a party to this MOU nor shall any entity be considered a third party beneficiary to this MOU. This MOU is not intended to bind or affect any non-signatory party, and the failure of any non-signatory party to object to any provision of this MOU cannot be viewed as waiving, affecting, or prejudicing any non-signatory party's rights, factual arguments, legal arguments or legal positions.

5. This MOU constitutes the entire MOU between and among the parties with respect to the subject matter of this MOU. Any modification of this MOU must be made in writing and agreed to by all the parties.

6. All actions called for by this MOU are subject to and contingent upon the availability and allocation of future federal and state appropriations, existing and future limitations on a party's statutory authorities, and state and federal regulatory approvals, as needed.

7. This voluntary interparty MOU is not a contract.

8. All captions or subtitles used herein are intended solely for convenience of reference and shall in no way limit or broaden any of the provisions of this agreement.

9. All parties hereto intend to fully cooperate in all matters related to or arising out of this MOU.

10. This MOU may be executed in counterpart and faxed signatures will be accepted as originals.

AMENDMENT AND SEVERABILITY

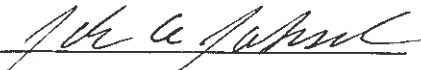
The Parties enter into and continue this MOU voluntarily and in good faith. This MOU shall be effective upon the signatures of the officials listed below. This MOU may be amended or supplemented at any time by mutual consent of the parties. This MOU is severable from any contracts or agreements that are entered into pursuant to this MOU.

TERMINATION OF MEMORANDUM

This MOU is intended to have an indefinite term but shall terminate upon written notice by any party hereto.

SIGNATURES


Kennewick Irrigation District

By 
John J. Jaksch, KID Board President
A. 1949

6-29-2010
Date

As authorized by Resolution of the
Board of Directors dated 6-29-2010, 2010

State of Washington Department of Ecology

By 
Ted Sturdevant, Director

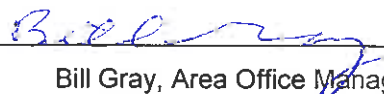
6-8-10
Date

State of Washington Department of Fish and Wildlife

By 
Phil Anderson, Director

6-8-10
Date

United States of America

By 
Bill Gray, Area Office Manager

6/28/10
Date

MOU Attachment 1

	Duty	Acres	Entitlement	Drive water
Red Mountain LID water	1.5 af	1,785	2,678	3,347
Red Mountain LID conveyance water savings	1.58 af	1,785	2,820	3,525
<u>Crop differential</u>	<u>2.0 af</u>	<u>1,785</u>	<u>3,570</u>	<u>4,463</u>
Totals	5.08 af	1,785	9,068	11,335

Prosser to Chandler (Reach Yakima RM 47 to Yakima RM 35.8)

	Long-Term Trust	Short-Term Trust	Water Not in Trust*	Total
Red Mountain LID water	0	0	2,678	
Red Mountain LID drive water	3,347	0		
Red Mountain LID conveyance water savings	1,410	1,410		
Red Mountain LID conveyance water savings drive water	0	3,525		
Crop differential	0	0	3,570	
<u>Crop differential drive water</u>	<u>0</u>	<u>4,463</u>		
Totals	4,757	9,398	6,248	20,403

Chandler to Kiona (Reach Yakima RM 35.8 to Yakima RM 30)

	Long-Term Trust	Short-Term Trust	Water Not in Trust*	Total
Red Mountain LID water	0	0	2,678	
Red Mountain LID drive water	0	0		
Red Mountain LID conveyance water savings	1,410	1,410		
Red Mountain LID conveyance water savings drive water	0	0		
Crop differential	0	0	3,570	
<u>Crop differential drive water</u>	<u>0</u>	<u>0</u>		
Totals	1,410	1,410	6,248	9,068

Kiona to McNary Pool (Reach Yakima RM 30 to Columbia RM 335)

	Long-Term Trust	Short-Term Trust	Water Not in Trust*	Total
Red Mountain LID water	0	0		
Red Mountain LID drive water	0	0		
Red Mountain LID conveyance water savings	0	2,820		
Red Mountain LID conveyance water savings drive water	0	0		
Crop differential	0	0	3,570	
<u>Crop differential drive water</u>	<u>0</u>	<u>0</u>		
Totals	0	2,820	3,570	6,390

MOU Attachment 1

New max delivery into the head works of the Main Canal

Nonprorationing Year	Prorationing Year (Quantity on which prorationing is based, cannot exceed 102,674)
102,674 (normal year per settlement)	109,275 (pro-rated year per settlement)
- 2,678 (to water not in trust Chandler to Kiona)	- 2,678 (to water not in trust Chandler to Kiona)
- 6,390 (short term trust and water not in trust Kiona to McNary)	- 1,410 (long-term trust Chandler to Kiona)
93,606 af (less up to 2,400 Wanawish)	105,187 af (less up to 2,400 at Wanawish)

*Notes:

- Any water put in the short-term trust program needs to also include the drive water and the conveyance water in the short-term trust program so that the District can get it into the Main Canal.
- Water in the trust program is pro-ratable (same as the rest of the water right).
- Water in the short-term trust program is included in the 109,275 af and should not be added in to calculate max delivery in the head works of the Main Canal in a pro-rated year.
- KID expects that 9,398 af in short-term trust can be pulled out of trust in circumstances other than a pro-rated year. Examples:
 - Diverting it at the future McNary Pool pump station
 - Diverting it at Wanawish
 - Use elsewhere in the District via the Main Canal
 - In the event the Red Mountain water users want to upgrade the system in the future to put more water on the same number of acres
- New max diversion at Prosser in a non pro-rated year:

231,017 af
~~-20,403 af~~
 210,614 af (less up to 2,400 af at Wanawish)
- The 6,248 af figure labeled "Water Not In Trust" is the re-routed project irrigation water from Prosser Dam downstream to the Kiona Pump Station. Although not in trust, it will be in addition to the flow targets at Prosser to ensure delivery to Kiona. The 4,757 af figure assumes \$10 Million in funding from the Columbia River program and will be reduced proportionately if the funding is reduced.